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Double Jeopardy's Multipunishment Protection and Regulation of Civil Sanctions After United States v. Ursery

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DOUBLE JEOPARDY'S MULTIPUNISHMENT PROTECTION AND REGULATION OF CIVIL SANCTIONS AFTER *UNITED STATES v. URSERY*

I. INTRODUCTION

The Double Jeopardy Clause provides a vital constitutional protection for defendants in the American criminal justice system.[1] Through its common law evolution, double jeopardy has safeguarded criminal defendants from three governmental actions.[2] As its most well-recognized power, double jeopardy prevents the state from prosecuting a criminal defendant for the same offense following an acquittal.[3] Double jeopardy also prohibits the state from prosecuting a criminal defendant for the same offense after a conviction.[4] Finally, the Double Jeopardy Clause's multipunishment protection forbids the state from punishing the criminal defendant more than once for the same offense.[5]

In recent years, the scope of double jeopardy's multipunishment protection has become an increasingly litigated issue in criminal law, and particularly as it applies to civil sanctions imposed in conjunction with criminal penalties.[6] Criminal defendants, facing both civil and criminal

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1. 3 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE §24.1 (1985) (citing Benton v. Maryland, 395 U.S. 784, 796 (1969)).

2. *See* North Carolina v. Pearce, 395 U.S. 784, 796 (1969).

3. United States v. Ball, 163 U.S. 662 (1896); Green v. United States, 355 U.S. 184 (1957).

4. *In re* Nielsen, 131 U.S. 176 (1889).

5. *See* Pearce, 395 U.S. at 717 (citing United States v. Benz, 282 U.S. 304, 307 (1931); Ex Parte Lange, 85 U.S. (18 Wall) 163 (1873)). Justice Antonin Scalia would differ on this point. *See* Dep't. of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 798 (1994) (Scalia, J., dissenting). As will be further highlighted in this article, Scalia finds that the double jeopardy doctrine protects only from successive prosecutions. *Id.; see also infra* Part III.

6. For purposes of this article and unless otherwise indicated, the term "civil sanction" shall be used to refer to a civil enforcement tool brought by the government against a criminal defendant or the criminal defendant's material possessions to force compliance with the law or administrative regulations. Civil sanctions take a variety of procedural forms and can include *in rem* forfeiture actions which are brought to recover the proceeds, instrumentalities, or contraband involved in the defendant's criminal activities. Civil sanctions can also include *in personam* actions which are brought personally against the defendant to recover restitution for the defendant's offense. Civil tax actions as well as various other administrative penalties can also fall within the realm of civil sanctions. For a general discussion of these distinctions, see *The Supreme Court: Recent Cases*, 110 HARV. L. REV. 135, 211 (1996) (citing Mary M. Cheh, *Can Something This Easy, Quick, and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. SCH. L. REV. 1, 14-15 (1994)). See *infra* note 20, for examples of recent attempts by defendants to use the multipunishment protection to invalidate civil sanctions imposed in conjunction with a criminal penalty.

sanctions for one offense, have raised the multipunishment defense to avoid the imposition of both sanctions.[7] Defendants have argued that some civil sanctions imposed by the government criminally punish a defendant a second time for the same conduct.[8]

The multipunishment defense arose for two general reasons. First, defendants perceived that the multipunishment protection had been expanded by the United States Supreme Court to apply to a wider array of civil sanctions.[9] Second, the government's expanded use of civil sanctions in its law enforcement activities created more opportunities for this type of double jeopardy litigation.[10]

In *United States v. Ursery*,[11] the Supreme Court clarified the Double Jeopardy Clause's multipunishment protection and its power to invalidate excessive civil forfeitures that are applied in conjunction with criminal penalties.[12] Under the *Ursery* decision, the Court limited the multipunishment protection to all but a few civil sanction cases.[13] In restricting the multipunishment protection, the Court stated that it was merely following long-established precedent—even though more recent Court cases had seemingly expanded the multipunishment protection.[14] The most important feature of the *Ursery* decision, however, is that it marks a definitive reversal of a perceived trend toward a broader multipunishment protection.[15] While the *Ursery* decision may be the final statement on the scope of the multipunishment protection, the opinion has raised questions about whether the Court has gone too far in lessening the power of this doctrine when individual defendants continue to face what could arguably be characterized as "punishing"

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7. *See* Dep't of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994); United States v. Halper, 490 U.S. 435 (1989).

8. For a brief survey of the various contexts in which defendants advocated a multipunishment defense, see *infra* note 20.

9. *See* Dep't of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994); United States v. Halper, 490 U.S. 435 (1989).

10. *See The Supreme Court: Recent Cases*, 110 HARV. L. REV. 135, 215 (1996) (citing Memorandum from Gerald E. McDowell, Chief, Asset Forfeiture & Money Laundering Section, U.S. Department of Justice, to Philip Heymann, Professor of Law, Harvard Law School 7 (Jan. 23, 1996)) (noting that the federal government seized $1.3 billion in property forfeitures in the first 9 months of 1995 alone).

11. 116 S. Ct. 2135 (1996).

12. *Id.*

13. *Id.* at 2143-45.

14. *Id.* at 2147-48 (citing United States v. 89 Firearms, 465 U.S. 354 (1984); One Lot of Emerald Cut Stones, 409 U.S. 232 (1972); Various Items of Personal Property v. United States, 282 U.S. 577 (1931)).

15. *Ursery*, 116 S. Ct. at 2144-45 (citing United States v. Halper, 490 U.S. 435 (1989)).

civil sanctions.[16]

Past precedent in this area provides the best perspective on how this new decision impacts the multipunishment protection and how the Court has grappled with defining "punishment" for double jeopardy purposes. A series of decisions rendered immediately prior to *Ursery* illustrate this problem most vividly.[17] As those cases demonstrate, the Court's test for when a civil forfeiture constituted "punishment" created a subjective determination that allowed little room for agreement.[18] Yet, at the same time, the Supreme Court declared that a civil sanction that could be fairly characterized as "punitive" must be invalidated under the multipunishment protection.[19]

Although its rationale may be questionable, the precedent established in *Ursery* has significantly impacted the confusing application of double jeopardy to civil sanctions. For example, numerous lower court decisions have consistently used *Ursery* to limit the application of the multipunishment defense in a variety of contexts.[20] Inevitably, the question of

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16. *See, e.g., The Supreme Court, Recent Cases*, 110 HARV. L. REV. 135 (1996).

17. *See* Dep't of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994); United States v. Halper, 490 U.S.435 (1989).

18. *See, e.g.*, United States v. Halper, 490 U.S. 435, 448 (1989).

19. *Id.* at 448-449.

20. Federal courts have used *Ursery* to reject the multipunishment defense in a variety of situations. *See, e.g.*, United States v. One Parcel of Real Property at 154 Manley Road, 91 F.3d 1 (1st Cir. 1996) (forfeiture of property used in drug offense); United States v. Amiel, 95 F.3d 135, 146 (2nd Cir. 1996) (forfeiture of art work used in mail fraud); United States v. Stemolkos, 100 F.3d 302, 311 (3rd Cir. 1996) (forfeiture of home due to illegal misrepresentation in naturalization application); United States v. Glymph, 96 F.3d 722, 725 (4th Cir. 1996) (debarment from government contracting by supplying non-conforming military goods); United States v. Keeton, 101 F.3d 48, 51 (6th Cir. 1996) (forfeiture of truck and personal goods used in drug trafficking); United States v. $87,118.00 in United States Currency, 95 F.3d 511, 514 (7th Cir. 1996) (forfeiture of moneys used in conspiracy to import heroin); United States v. Kress, 88 F.3d 664 (8th Cir. 1996) (forfeiture of firearms used in conspiracy to distribute methamphetamine); United States v. One 1978 Piper Cherokee Aircraft, 91 F.3d 1204, 1210 (9th Cir. 1996) (forfeiture of aircraft used in drug trafficking); United States v. Bailey, 104 F.3d 368 (10th Cir. 1996) (forfeiture of currency seized in connection with drug trafficking); United States v. Two Parcels of Real Property Located in Russell County, Alabama, 92 F.3rd 1123, 1129 (11th Cir. 1996) (forfeiture of property purchased with proceeds from the sale of controlled substances); United States v. Coleman, 940 F. Supp. 15, 17 (D.C. Cir. 1996) (forfeiture of currency from money laundering operation).

Ursery has also been adopted in a variety of contexts in state courts. *See, e.g.*, Sims v. State, 930 S.W.2d 381, 382 (Ark. 1996) (forfeiture of currency used in connection with possession of controlled substances); People v. Shanndoah, 57 Cal. Rptr. 2d 232, 234 (Cal. Ct. App. 1996) (forfeiture of currency used in connection with drug offense); Deutschendorf v. People, 920 P.2d 53, 59 (Colo. 1996) (forfeiture of operator's license in conjunction with driving-while-intoxicated charge); Covelli v. Comm'r of Revenue Services, 683 A.2d 737 (Conn. App. Ct. 1996) (drug tax imposed after criminal drug possession); In re 1982 Honda,

whether the Supreme Court's decision is founded on a workable premise and makes good public policy must be answered.

This Comment examines the Supreme Court's recent treatment of the Double Jeopardy Clause's multipunishment protection, with emphasis on the Court's decision in *United States v. Ursery*.[21] Part II of this Comment will trace the history of the Double Jeopardy Clause's multipunishment protection to its use in *United States v. Halper*[22] and *Department of Revenue of Montana v. Kurth Ranch*.[23] Part II will also examine the interplay between the multipunishment protection and *United States v. Austin*,[24] in which the Supreme Court indicated that the Excessive Fines Clause offers some complimentary powers to double jeopardy's multipunishment protection. Part III analyzes a corollary double jeopardy issue, assessing Justice Scalia's contention that no legitimate historical or constitutional basis exists for the multipunishment

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681 A.2d 1035, 1036 (Del. Super. Ct. 1996) (forfeiture of auto used in drug trafficking); State v. Powelson, 680 So.2d 1089 (Fla. Dist. Ct. App. 1996) (forfeiture under Florida's Contraband Forfeiture Statute); Murphy v. State, 475 S.E.2d 907, 908 (Ga. 1996) (forfeiture of currency proceeds from illegal drug distribution); State v. Tiupuapua, 925 P.2d 311 (Haw. 1996) (forfeiture of automobile used in burglary); State v. McGough, 924 P.2d 633, 635 (Idaho Ct. App. 1996) (forfeiture of truck and currency used in the purchase of methamphetamine); People v. Ratliff, 669 N.E.2d 122, 124 (Ill. App. Ct. 1996) (civil fines, storage expenses in connection with unlawful possession of automobile); State v. Sonnier, 679 So.2d 1011, 1012 (La. Ct. App. 1996) (forfeiture of operator's license suspension imposed in conjunction with driving while intoxicated charge); Albano v. Commonwealth, 667 N.E.2d 862 (Mass. 1996) (forfeiture of money, cellular phone, and proceeds from a motor vehicle used in illicit drug distribution); Jones v. State, 681 A.2d 1190, 1198 (Md. Ct. Spec. App. 1996) (forfeiture of truck used in drug trafficking); State v. O'Connor, 681 A.2d 475, 477 (Me. 1996) (administrative removal of prisoner's good time credit for assault on prison guard in conjunction with criminal assault charges); State v. Scott, 933 S.W.2d 884, 887 (Mo. Ct. App. 1996) (forfeiture of currency gained through various drug offenses); State v. Schnittgen, 922 P.2d 500, 504 (Mont. 1996) (termination of state job after criminal mischief conviction); State v. $3,000 in United States Currency, 678 A.2d 741, 743 (N.J. Super. Ct. App. Div. 1996) (forfeiture of automobile and cash used in connection with a drug crime); Umatilla County v. $18,005 in United States Currency, 921 P.2d 426, 428 (Or. Ct. App. 1996) (forfeiture of money used in connection with possession of controlled substances); Commonwealth v. Trayer, 680 A.2d 1166, 1167 (Pa. Super. Ct. 1996) (forfeiture of automobile and cellular phone used in connection with drug trafficking); Blessing v. State, 927 S.W.2d 310, 312 (Tex. Civ. App. 1996) (forfeiture of home used in marijuana manufacturing); Wilson v. Commonwealth, 477 S.E.2d 765, 767 (Va. Ct. App. 1996) (forfeiture of vehicle used in driving under the influence offense); Tellevik v. Real Property Known as 6717 100th St. Located in Pierce County, 921 P.2d 1088, 1091 (Wash. Ct. App. 1996) (forfeiture of home used in marijuana manufacturing); State v. Greene, 473 S.E.2d 921, 925 (W. Va. 1996) (forfeiture of truck and cellular phone used in connection with possession of controlled substances).

21. 116 S. Ct. 2135 (1996).
22. 490 U.S. 433 (1989).
23. 511 U.S. 767 (1994).
24. 509 U.S. 602 (1993).

protection. Part III will also evaluate Scalia's suggestion in his *Kurth Ranch* dissent that using the Excessive Fines Clause as an alternative to the Double Jeopardy Clause presents a better option for regulating civil forfeitures. Part IV will compare the different standards used by the Court before *Ursery* for determining whether a civil sanction constituted punishment under the multipunishment protection. Finally, Part V will analyze the viability of the current multipunishment prohibition in light of *Ursery* and assess its ramifications for both law enforcement and criminal defendants.

II. THE EVOLUTION OF THE DOUBLE JEOPARDY CLAUSE'S MULTIPUNISHMENT PROTECTION

A. The Constitutional Beginnings

Protection from multiple punishments has its genesis in a proposed version of the Double Jeopardy Clause authored by James Madison.[25] Madison's version read: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense."[26] The Framers never incorporated this wording into the final draft of the Bill of Rights, instead using the legal language that currently appears in the Fifth Amendment.[27] However, as later Supreme Court decisions demonstrate, the Framers' acceptance of an alternatively-worded Double Jeopardy Clause did not dispose of the provision's ability to protect from multiple punishments.[28]

Over three-quarters of a century after the enactment of the Bill of Rights, the multipunishment protection was formally recognized by the Supreme Court in *Ex Parte Lange*.[29] In *Lange*, a jury found the defendant, Edward Lange, guilty of stealing several mail bags from the post office.[30] Federal law mandated a sentence of either a fine or imprisonment for Lange's offense.[31] However, the sentencing judge

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25. *See* 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1789).

26. *Id.* at 753, 767; *see generally* 1 Senate Journal 105, 119, 130 (1790).

27. U.S. CONST. amend. V. The Double Jeopardy Clause of the Fifth Amendment states in pertinent part: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." *Id.*

28. *See* United States v. Wilson, 420 U.S. 332, 341-342 (1975); *see also* R. Gustave Lehouck III, Note, *A Definition of Punishment for Implementing the Double Jeopardy Clause's Multiple-Punishment Prohibition*, 90 YALE L.J. 632, 635, n. 16 (1981). *Cf.* Frankfurter's view, *infra* notes 62-65, and accompanying text.

29. 85 U.S. (18 Wall.) 163 (1873).

30. *Id.* at 164.

31. *Id.* at 179.

failed to follow this statutory authorization and ordered both a fine and imprisonment for Lange.[32] Before seeking relief, the defendant paid his fine and began to serve his jail term.[33]

On habeas review, the Supreme Court overturned the defendant's sentence on the ground that the trial court exceeded its sentencing power and jurisdiction by simultaneously ordering fine and imprisonment.[34] While the Court could have settled the legality of Lange's sentence by looking to the trial judge's violation of the sentencing requirements under statute, it also based its decision on the Double Jeopardy Clause.[35] The Court's rationale crystallized double jeopardy's multipunishment protection: "[W]e do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it."[36] The *Lange* Court reasoned that double jeopardy implicitly carried both a multiple prosecution and multipunishment protection.[37] It held that two concepts were synonymous, reasoning that a prosecution, by definition, will ultimately result in punishment.[38] Consequently, the Court reasoned that if the Clause protects against one of these government actions, it must necessarily protect against the other.[39]

The Supreme Court in *Lange* also recognized that the Double Jeopardy Clause applies to more than just criminal prosecutions where "life or limb" are at stake, finding that the Clause shields against prosecution for "felonies, minor crimes, and misdemeanors alike."[40] Recalling that during the framing of the Double Jeopardy Clause most individuals faced punishments threatening death or corporal punishment,[41] the *Lange* court expressed foresight when it acknowledged that future punishment could evolve to include other penalties:

> [O]n the difficulty of deciding when a statute under modern systems does or does not describe a felony when it defines or describes an offence, we shall see . . . that the principle intended

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32. *Id.* at 180.
33. *Id.* at 166.
34. *Id.* at 178.
35. *Id.*
36. *Id.* at 173.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 173. Other commentators have also stated that the multipunishment protection is simply an outgrowth of the reprosecution protection. *See* 3 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE §24.1 (1985).
41. *Lange*, 85 U.S. at 173.

> to be asserted by the constitutional provision [of double jeopardy] must be applied to all cases where a second punishment attempted is to be inflicted for the same offense by a judicial sentence.[42]

With this language, the Court set the foundation for future cases considering the use of the multipunishment protection as an explicit component of the Double Jeopardy Clause's powers.

B. Penalty Evaluation Through Statutory Construction

More than half a century after *Lange*, the Supreme Court again examined the multipunishment protection of the Double Jeopardy Clause in *Helvering v. Mitchell*.[43] In *Mitchell*, the defendant was charged in federal court with criminal tax evasion, but was acquitted by a jury.[44] Despite the acquittal, the government attempted to assess a civil penalty against Mitchell, which amounted to one-half of his tax deficiency.[45]

As one of his chief defenses to the civil penalty, Mitchell pleaded multipunishment protection. He asserted that although the tax penalty was sought in a civil action, it was sufficiently punitive in effect to rise to the level of a second criminal proceeding.[46] The Court agreed with Mitchell that a nominal civil penalty could be barred by the Double Jeopardy Clause if it was designed to serve a punitive purpose: "Unless this sanction was intended as punishment, so that the proceeding is essentially criminal, the double jeopardy clause provided for the defendant in criminal prosecutions is not applicable."[47] The Court found that the congressional intent behind the legislation was central in determining whether the civil penalty was effectively a second criminal punishment:

> Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally for the same offense. The question for decision is thus whether [the relevant statute] imposes a criminal

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42. *Id.*
43. 303 U.S. 391 (1938).
44. *Id.* at 396.
45. *Id.* In the criminal prosecution, the United States charged Mitchell with willfully evading taxes in the amount of $728,709.84. *Id.* The government subsequently charged Mitchell with a civil forfeiture of 50% of that deficiency or $364,354.92 under § 293(b) of the Revenue Act of 1928, Title I, ch. 852, 45 Stat. 791 (1928). *Id.* at 395.
46. *Id.* at 399.
47. *Id.* at 398-99.

sanction. The question is one of statutory construction.[48] Ultimately, the *Mitchell* court decided that the tax penalty was not a punitive measure, but operated as a remedial mechanism designed to recoup financial losses that the government incurred during the investigation and prosecution of tax fraud cases.[49]

From a factual standpoint, *Mitchell* was not a true multipunishment case, but rather a multiple prosecution case. Since Mitchell's acquittal prevented the government from imposing an initial criminal punishment, any further punitive sanction would not have triggered the protection. Yet, defendant Mitchell adopted the *Lange* rationale that prosecution and punishment can be synonymous, and argued that the tax penalty was a second criminal prosecution due to its punitive effect.[50] Although the Court disagreed with Mitchell's argument, the *Mitchell* precedent's standard of statutory construction for evaluating whether a sanction constitutes punishment became a lasting and influential test arising out of the decision.[51]

Six years after *Mitchell*, the Court faced a true multipunishment question in *United States* ex. rel. *Marcus v. Hess*.[52] In *Hess*, the defendants, all Pittsburgh electrical contractors, engaged in collusive bidding on New Deal construction projects for the Public Works Administration.[53] They were convicted initially of criminal conspiracy to defraud the government.[54] In a subsequent *qui tam* action[55] heard by the Supreme Court, the defendants were sued for civil penalties resulting from their fraud.[56] The defendants challenged their civil suit as being violative of the multipunishment protection, alleging that the civil forfeiture of double damages assessed against them was punitive and

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48. *Id.* at 399. The *Mitchell* court reasoned that because Congress had distinguished between the civil and criminal penalties in the Revenue Act of 1928 and because Congress labeled some penalties as civil and provided a civil procedure for pursuing those penalties, the civil penalty at issue in *Mitchell* was not meant to be penal or punitive. *Id.* at 402.

49. *Id.* at 401.

50. *Id.* at 399 (citing *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1874)).

51. *See* United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); Rex Trailer Co., Inc. v. United States, 350 U.S. 148 (1956); United States *ex. rel.* Marcus v. Hess, 317 U.S. 537 (1943).

52. 317 U.S. 537 (1942).

53. *Id.* at 539.

54. *Id.* at 548.

55. In a *qui tam* action a private party plaintiff brings an action in conjunction with the United States and "shares with the Government" any proceeds of the action. *See* United States v. Halper, 490 U.S. 435, 451, n.11 (1989).

56. *Hess*, 317 U.S. at 540. The civil penalties authorized by the statute consisted of a $2,000 forfeiture and double damages. *Id.* at 549.

constituted an impermissible second punishment under double jeopardy.[57]

The *Hess* court followed the statutory construction analysis used in *Helvering v. Mitchell*[58] and held that the civil penalty authorized by Congress was intended to be remedial rather than punitive: "We think the chief purpose of the statutes here was to provide for restitution to the government of the money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole."[59] The Court noted that while the civil penalty at issue may inadvertently cause a degree of punishment for an individual, that subjective effect does not override its predominantly remedial purpose: "'Punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrong-doer is concerned,' but this is not enough to label it as a criminal statute."[60] By not examining a sanction's punitive effect for determining punishment, the *Hess* court reinforced the traditional standard of statutory construction offered in *Mitchell*.[61]

Justice Felix Frankfurter offered a different perspective on multipunishment theory when he concurred with the majority in *Hess*.[62] He believed that the framers never intended the Double Jeopardy Clause to prevent the government from simultaneously bringing separate civil and criminal actions for a single act of misconduct.[63] Because dual prosecution had traditionally existed and was contemplated by the framers during the drafting of the Fifth Amendment,[64] Frankfurter viewed the bringing of both civil and criminal claims against an individual in one "comprehensive" punishment scheme as a legitimate exercise of the legislative power of Congress.[65]

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57. *Id.* at 548.

58. 303 U.S. 391 (1938).

59. *See* United States *ex. rel.* Marcus v. Hess, 317 U.S. 537, 551-52 (1942).

60. *Id.* at 551 (quoting Brady v. Daly, 175 U.S. 148, 157 (1899)).

61. *Hess*, 317 U.S. at 551-52; *Mitchell*, 303 U.S. at 399.

62. *Hess*, 317 U.S. at 553. Frankfurter found the majority's rejection of the multipunishment protection based on statutory structure and legislative intent to be inadequate. *Id.* at 555-56 (Frankfurter, J., concurring). Instead, he formulated an alternative rationale based on the framer's intent to support the imposition of the civil sanction. *Id.*

63. *Id.* at 556. (Frankfurter, J., concurring). "It would do violence to proper regard for the framers of the Fifth Amendment to assume that they contemporaneously enacted and continued to enact legislation that was offensive to the guarantees of the double jeopardy clause which they had proposed for ratification." *Id.*

64. *Id.* at 555.

65. *Id.*

The *Hess* precedent was instrumental in deciding a subsequent important double jeopardy case. In *Rex Trailer Co. v. United States*,[66] the Court encountered the novel problem of a civil sanction that exacted a penalty from the defendant that exceeded the remedial value of the defendant's offense, thus seeming punitive. Two years after World War II, the Rex Trailer Company attempted to gain priority status in purchasing surplus war vehicles from the government under the Surplus Property Act.[67] The defendant falsely used certain veterans' names to take advantage of a provision under the Act which gave war veterans priority status in purchasing excess military goods.[68] After the defendant pleaded no contest to criminal charges of misconduct, the government fined Rex Trailer $25,000.[69] Shortly thereafter, the federal government brought a civil action against Rex Trailer, seeking liquidated damages under the civil forfeiture provision of the Surplus Property Act.[70]

The defendant Rex Trailer objected to the subsequent civil action as being violative of the multipunishment protection.[71] It claimed that the statute's liquidated damages provision obscured a determination of whether the civil forfeiture was a penal or remedial sanction, because the government never had to show its actual damages.[72] Nevertheless, the Supreme Court held that liquidated damages, despite not reflecting actual damages, were a civil remedy that did not rise to the level of punishment.[73] Relying on the *Hess* precedent, the Court reasoned that because the fixed amount of damages allowable under the statute were roughly equivalent to the anticipated loss suffered by the government, the civil sanction could be fairly characterized as remedial.[74]

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66. 350 U.S 148 (1956).
67. *Id.* at 150; 50 U.S.C. § 1635 (1946 ed.).
68. *Rex Trailer Co.*, 350 U.S. at 150-51.
69. *Id.* at 149.
70. *Id.* at 149-50.
71. *Id.* at 150.
72. *Id.* at 152.
73. *Id.* at 153-54.
74. *Id.* The Court found that liquidated damages are a typical contract provision that "serve a particularly useful function when damages are uncertain." *Id.* (quoting Priebe & Sons v. United States, 332 U.S. 407, 411-12 (1947)). While the exact amount of harm caused by the defendant Rex Trailer may have been unquantifiable, the Court did find the company's fraud caused the government some damage: "It precluded bona fide sales to veterans, decreased the number of motor vehicles available to Government agencies, and tended to promote undesirable speculation." *Rex Trailer Co.*, 350 U.S. at 153. The Court held that in light of these injuries, the liquidated damages clause reasonably compensated the government for the fraud. *Id.* at 153-54.

C. Contemporary Application of the Multipunishment Protection

In 1969 the Supreme Court applied the Double Jeopardy Clause's protections to the states through the Fourteenth Amendment in *Benton v. Maryland*.[75] It also explicitly recognized the multipunishment protection as one of three distinct rights offered by the clause in *North Carolina v. Pearce*.[76] In *Pearce*, the Court ruled that a state trial court's imposition of a greater sentence upon retrial without crediting for previous time served violated the Double Jeopardy Clause's protection against multiple punishments.[77] The *Pearce* court reasoned that an individual under those circumstances was being punished more than legislatively authorized and was effectively being twice punished for the same offense.[78] *Pearce*, while factually analogous to *Ex Parte Lange*,[79] suggested that the main purpose underlying the multipunishment protection was limited to controlling the sentencing discretion of the trial court to the boundaries established by the legislature.[80]

By the time the Double Jeopardy Clause was applied to the states, *in rem* civil forfeitures had become an entrenched phenomenon in the administration of justice.[81] Consequently, the Court had developed a stable of cases addressing whether *in rem* civil forfeitures implicated the multipunishment protection.[82] In three important decisions, which later formed the basis of the *Ursery* holding, the Supreme Court consistently upheld *in rem* civil forfeitures that faced multipunishment attack.[83]

Various Items of Personal Property v. United States[84] provided early precedent in which the Court held that *in rem* civil forfeitures did not

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75. 395 U.S. 784, 796 (1969).
76. 395 U.S. 711, 717 (1969).
77. *Id.* at 718.
78. *Id.*
79. 85 U.S. (18 Wall.) 163 (1873).
80. *See Pearce*, 395 U.S. at 717-18; *see also* Ohio v. Johnson, 467 U.S. 493 (1984) (distinguishing between double jeopardy's protection from multiple trials and its protection from multiple punishments which is primarily intended to control the sentencing power of judges).
81. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974). See *supra* note 6, for further explanation of *in rem* civil forfeitures.
82. *See* United States v. 89 Firearms, 465 U.S. 354 (1984); One Lot of Emerald Cut Stones, 409 U.S. 232 (1972) (per curiam); Various Items of Personal Property v. United States, 282 U.S. 577 (1931).
83. Various Items of Personal Property v. United States, 282 U.S. 577 (1931); One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972) (per curiam); United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984).
84. 282 U.S. 568 (1931).

trigger the double jeopardy protection.[85] In *Various Items*, the federal government brought an *in rem* forfeiture action to recover a distillery, warehouse, and denaturing plant used for making alcohol for human consumption during Prohibition.[86] In responding to the defendant's argument that the multipunishment protection prohibited this forfeiture, the Court made a crucial distinction between *in rem* forfeitures and criminal prosecutions:

> It is the property which is proceeded against and, by resort to legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished. The forfeiture is not part of the punishment for the criminal offense. The provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply.[87]

In a subsequent case, *One Lot of Emerald Cut Stones v. United States*,[88] the defendant entered the United States without declaring that he was carrying certain precious stones and a ring.[89] The federal government criminally prosecuted the defendant for smuggling and later brought a civil forfeiture action to recover the smuggled goods.[90] While subscribing to the *Mitchell* statutory construction method for evaluating the civil forfeiture, the Court also noted that the civil *in rem* forfeiture brought to recover the smuggled goods was not "so unreasonable or excessive that it [transformed] what was clearly intended as a civil penalty into a criminal penalty."[91]

More recently in *United States v. One Assortment of 89 Firearms*,[92] the Supreme Court enhanced the statutory construction doctrine for determining whether a government sanction constitutes punishment. In *89 Firearms*, the defendant, Patrick Mulcahey, was acquitted of dealing in firearms without a license.[93] The federal government then brought an *in rem* civil forfeiture action against Mulcahey seeking to seize the

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85. *Id.* at 581.
86. *Id.* at 578.
87. *Id.*
88. 409 U.S. 232 (1972).
89. *Id.* at 237.
90. *Id.*
91. *Id.* at 237 (citing Rex Trailer Co., Inc. v. United States, 350 U.S. 148 (1956); United States *ex. rel.* Marcus v. Hess, 317 U.S. 537 (1942); Murphy v. United States, 272 U.S. 630 (1926)).
92. 465 U.S. 354 (1984).
93. *Id.* at 356; *see generally* 18 U.S.C. § 922(a)(1) (1976).

firearms that were used in Mulcahey's illegal gun business.[94] Mulcahey claimed that because the civil forfeiture was "punitive" it amounted to a second criminal punishment for the same offense in violation of double jeopardy.[95] The Supreme Court declined to characterize the forfeiture as a punitive measure, but in its decision adopted a more comprehensive statutory construction approach:

> Our inquiry in this regard has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.[96]

By requiring a "further inquiry" into the "purpose" or "effect" of a sanction, the Court in *89 Firearms* added a second level to the statutory construction test of *Mitchell v. Helvering*. This added scrutiny highlighted a broader effects test that was used in subsequent cases.[97]

D. Expansion of the Multipunishment Protection: The Halper-Austin-Kurth Doctrine

1. United States v. Halper

In 1989, the Court expanded the multipunishment protection to civil penalties. *United States v. Halper*[98] represented the first decision in which the Court, using double jeopardy's multipunishment protection, invalidated an *in personam* civil penalty that followed a criminal conviction.[99] The defendant, Irwin Halper, while working as a manager for a medical lab in New York City, submitted 65 false claims to Medicare, causing the government to unnecessarily pay out $585 in disbursements.[100] The federal government uncovered Halper's fraud and initiated a criminal prosecution against him under the False Claims Act.[101] Halper was convicted and sentenced to two years in prison and

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94. *89 Firearms*, 465 U.S. at 356; *see generally* 18 U.S.C. § 924(d) (1976).
95. *89 Firearms*, 465 U.S. at 356.
96. *Id.* at 362-63 (quoting United States v. Ward, 448 U.S. 242, 248 (1980)) (citation omitted).
97. *See* United States v. Halper, 490 U.S. 435, 447 (1989).
98. 490 U.S. 435 (1989).
99. *Id.* at 449.
100. *Id.* at 437.
101. *Id.*; *see generally* 18 U.S.C. § 287 (1988).

fined $5,000.[102]

After the completion of Halper's criminal prosecution, the federal government brought a civil action against him under the civil prong of the False Claims Act.[103] Using the evidence from the criminal conviction, the trial court found that Halper was civilly liable.[104] The federal district court then proceeded to follow the statutory penalty formula under the civil False Claims Act[105] and imposed a fine of $130,000, or $2,000 for each of Halper's 65 violations.[106] Upon reflection, the trial court found that this large civil penalty rose to the level of criminal punishment, reasoning that because the civil fine was so greatly disproportionate to the underlying offense, it lacked any remedial character.[107] Consequently, the trial court held that double jeopardy's multipunishment protection barred this civil punishment in light of Halper's previous criminal sanctions for the same offense.[108]

On appeal, the Supreme Court considered whether Halper's civil penalty triggered double jeopardy protection.[109] Counsel for the government cited a line of precedent, including *Mitchell*[110] and *Hess*,[111] that supported the proposition that the government could recoup more than its actual financial losses with a civil penalty and also avoid implicating the Double Jeopardy Clause.[112] However, the Court rejected the government's precedent as inapplicable, finding that no cited case addressed *Halper's* unique situation of a civil penalty that was radically disproportionate to the government's underlying damages.[113] The Court held that this imbalance destroyed the remedial quality of the penalty.[114] The Court also decided that the traditional statutory construction used in *Helvering v. Mitchell*[115] was not always the best

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102. *Halper*, 490 U.S. at 437.
103. *Id.* at 438; *see generally* 31 U.S.C. §§ 3729-3731 (1982 ed. Supp. II).
104. *Halper*, 490 U.S. at 438.
105. *Id.* The statutory language stated that violators will be "liable to the United States Government for a civil penalty at $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action." *Id.* (quoting 31 U.S.C. §§ 3729-3731 (1982)).
106. *Halper*, 490 U.S. at 438.
107. *Id.*
108. *Id.*
109. *Id.* at 441.
110. Helvering v. Mitchell, 303 U.S. 391 (1938).
111. United States *ex. rel.* Marcus v. Hess, 350 U.S. 148 (1956).
112. *Halper*, 490 U.S. at 441.
113. *Id.* at 446.
114. *Id.*
115. 303 U.S. 391 (1938).

determinant of the true nature of some civil penalties levied against an individual. The Court knew that relying on the statutory construction technique would legitimize this particular punitive sanction, and thus looked to the sanction's personal impact on the individual to determine whether it punishes:

> [W]hile recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not well suited to the context of the "humane interests" safeguarded by the Double Jeopardy Clause's proscription of multiple punishments. This constitutional protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state.[116]

The Court held that regardless of legislative label,[117] the civil penalty authorized by the False Claims Act could be reasonably characterized as punitive, and thus represented a second punishment prohibited by the Double Jeopardy Clause.[118] In seminal language that would prompt later multipunishment litigation, the Court described when a civil forfeiture violates the multipunishment protection:

> We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. Furthermore, "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.[119]

With its "solely remedial" language and its assessment of the "personal" impact of a sanction, the *Halper* decision diminished the traditional statutory construction method for determining when a sanction constituted punishment in favor of scrutinizing the sanction's punitive

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116. *Halper*, 490 U.S at 447 (citing *Hess*, 317 U.S. at 554 (1943) (Frankfurter, J., concurring)).

117. *Halper*, 490 U.S. at 447. The Court noted specifically: "In making this assessment, the labels 'criminal' and 'civil' are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties." *Id.* (citing *Hess*, 317 U.S. at 554 (1943) (Frankfurter, J. concurring)).

118. *Halper*, 490 U.S. at 447.

119. *Id.* at 448 (citations ommitted).

effect on a defendant. Furthermore, the new standard lowered the constitutional threshold for when a civil sanction could be subject to multipunishment attack. After *Halper*, any sanction that had a punitive "effect" because of its retributive or deterrent qualities could be vulnerable to double jeopardy attack. From a practical perspective, the *Halper* holding allowed judges to make a more subjective evaluation of how a sanction personally affects an individual in order to determine whether it constitutes a second criminal punishment.[120]

Due to this unprecedented holding and the potential misconceptions about the scope of its applicability, the Court was keen to describe the *Halper* decision as a "rule for the rare case," narrowly based on its own unique set of circumstances.[121] Justice Kennedy, in his concurring opinion, seemed equally aware of *Halper's* potential confusion for lower courts and legislatures and emphasized that under *Halper* the government was still entitled to bring a civil action where "the civil penalty imposed in the second proceeding bears [a] rational relation to the damages suffered by Government."[122] Even with these limiting remarks, the *Halper* holding created such potential benefits for defendants facing simultaneous civil and criminal sanctions that they began to utilize it as a double jeopardy defense.[123]

2. Department of Revenue of Montana v. Kurth Ranch

Halper demonstrated how *in personam* civil forfeitures that are applied in conjunction with criminal sanctions could implicate the multipunishment protection. Because the Court described *Halper* as a narrow decision that was largely dependent on its particular facts, the impact of the Court's holding was uncertain.[124] The Supreme Court's subsequent decision in this area, *Department of Revenue of Montana v. Kurth Ranch*,[125] confirmed the potentially broad scope of the *Halper* rationale for invalidating civil penalties that were imposed along with criminal sanctions.

The six defendants in *Kurth Ranch* were all family members who, while living on a central Montana cattle ranch, engaged in a large

120. *See* Andrew Z. Glickman, Note, *Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishments Doctrine to Parallel Proceedings After* United States v. Halper, 76 VA. L. REV. 1251, 1267-68 (1990).

121. *Halper*, 490 U.S. 435, 441 (1989).

122. *Id.* at 453 (Kennedy, J., concurring).

123. *See* Glickman, *supra* note 120, at 1267-68.

124. *Halper*, 490 U.S. at 449-450.

125. 511 U.S. 767 (1994).

marijuana manufacturing operation.[126] Just prior to the apprehension of the Kurths, Montana had passed new legislation, called the Dangerous Drug Tax Act,[127] which imposed a tax on various illegal drugs possessed in the state.[128] After authorities raided the Kurth Ranch and uncovered the drug operation, the state of Montana charged the defendants with various criminal drug possession counts and in a separate proceeding attempted to collect revenues from the Kurths under the Dangerous Drug Tax Act.[129] The defendants eventually consented to a plea agreement as to the criminal charges, and two of the Kurths were given prison terms, while the remaining members were placed on probation.[130] The state assessed almost $900,000 in drug taxes against the defendants due to their drug operations and the family attempted to dispute the tax in administrative proceedings.[131] Before an administrative ruling could take place regarding the amount of tax owed, the Kurths filed for bankruptcy.[132]

In federal bankruptcy court, the Kurths argued that the drug tax assessed against them was unconstitutional because it violated the Double Jeopardy Clause's multipunishment protection.[133] The Bankruptcy Court agreed.[134] Relying primarily on the Supreme Court's *Halper* decision, the court found the high level of the tax had a significant punitive and deterrent effect, and thus constituted an impermissible second punishment for the Kurths' original drug offense.[135] The federal district court affirmed the Bankruptcy Court based on the same reasoning.[136] The Court of Appeals for the Ninth Circuit equated the tax with the civil forfeiture provision in *Halper* and then, after applying *Halper's* reasoning to the *Kurth* facts, found that a tax could be construed as punishment if its sanction went beyond a remedial state purpose.[137] Because the State of Montana could not demonstrate a rational relationship required by *Halper* between the tax

126. *Id.* at 771.
127. MONT. CODE ANN. §§ 15-25-101 to -123 (1987).
128. *Kurth Ranch*, 511 U.S. at 770-71.
129. *Id.*
130. *Id.* at 772.
131. *Id.* at 773.
132. *Id.*
133. *See In re* Kurth Ranch, 145 B.R. 61, 66 (Bankr. N. D. Mont. 1990).
134. *Id.* at 72-73.
135. *Id.*
136. Dep't of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 773 (1994).
137. *See* In re Kurth Ranch, 986 F.2d 1308, 1312-13 (9th Cir. 1993), *aff'd*, Dep't. of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994).

and the state's actual damages, the Ninth Circuit found that the tax was penal and consequently barred it under the multipunishment protection.[138]

On review to the Supreme Court, the majority, in a 5-4 decision,[139] also invalidated the Montana drug tax.[140] While the Court utilized much of the *Halper* decision's reasoning in its analysis, it declined to strictly apply *Halper's* test to the drug tax, noting that a tax and the *in personam* civil forfeiture at issue in *Halper* were functionally and structurally different.[141] Nevertheless, the Court found the Montana drug tax was not a traditional revenue-raising tax and had sufficient punitive effect so as to constitute punishment for double jeopardy purposes.[142]

The Court's majority specifically noted three unique factors that supported the defendants' argument that the drug tax constituted a second punishment.[143] First, the high tax rate relative to the underlying offense, while not dispositive of the punishment issue, reinforced the tax's punitive character.[144] Second, the tax's triggering mechanism being actual criminal drug possession indicated that the Montana legislature sought to deter drug possession rather than raise revenue by passing the act.[145] Finally, because the tax was levied on goods that were previously confiscated and no longer possessed by the taxpayer, the tax closely resembled a punitive fine designed to penalize former drug possession.[146]

Kurth Ranch contained three dissents. Two separate dissents authored by Chief Justice Rehnquist[147] and Justice O'Connor[148] both declined to find that the Montana drug tax was a second punishment, but rather that it had the remedial state purpose of recouping the costs of drug enforcement.[149] Justice Scalia, joined by Justice Thomas, rejected

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138. *Kurth Ranch*, 511 U.S. at 767-769.
139. *Id.* Justice Stevens authored the majority opinion joined by Justices Blackmun, Kennedy, Souter, and Ginsburg. *Id.* Chief Justice Rehnquist and Justices O'Connor, Scalia, Thomas dissented. *Id.*
140. *Kurth Ranch*, 511 U.S. at 776.
141. *Id.* at 784.
142. *Id.*
143. *Id.* at 780-83.
144. *Id.*
145. *Id.* at 781-82.
146. *Id.* at 783.
147. *Id.* at 785 (Rehnquist, C.J., dissenting).
148. *Id.* at 792 (O'Connor, J., dissenting).
149. *Id.* at 785 (Rehnquist, C.J., dissenting).

the legitimacy of double jeopardy's multipunishment protection as applied to civil sanctions.[150] Borrowing traditional statutory construction standards for determining a criminal proceeding, Scalia found the tax to be a legitimate remedial measure that did not trigger double jeopardy protection.[151]

3. United States v. Austin

While *United States v. Austin*[152] was not a multipunishment case, but rather interpreted the Excessive Fines Clause, it is relevant to civil forfeiture law because its analysis relied heavily on *Halper's* punishment rationale. The defendant, Richard Lyle Austin, was convicted in South Dakota state court of possessing cocaine with intent to distribute.[153] The federal government then brought a civil *in rem* forfeiture action against him, attempting to confiscate his mobile home and auto body shop used in his drug trafficking activities.[154] The defendant contended that the forfeiture action constituted a violation of the Excessive Fines Clause of the Eighth Amendment.[155] While the defendant's argument was rejected by both the federal district court and the Court of Appeals for the Eighth Circuit, the Supreme Court decided that the Excessive Fines Clause did act to limit the *in rem* forfeitures at issue in the

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150. *Id.* at 798 (Scalia, J., dissenting). *See also infra* Part III.

151. *Kurth Ranch*, 511 U.S. at 806-09. *See also infra* Part III.

152. 509 U.S. 602 (1993).

153. *Id.* at 604.

154. *Id.* at 606; *see generally* 21 U.S.C. § 881(a)(4)-(7) (1990). The statute states in pertinent part:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them . . .
>
> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances or raw materials used in manufacturing, compounding, or processing any controlled substance] . . .
>
> . . .
>
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used or intended to be used, in any matter or part, to commit, or to facilitate the commission of a violation of this subchapter punishable by more than one year's imprisonment . . . .

21 U.S.C. § 881(a)(4)-(7) (1990).

155. *See Austin*, 509 U.S. at 606. The Eight Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

case.[156] The Court reasoned initially that the Excessive Fines Clause applied to punitive civil forfeitures because it was "intended to prevent the government from abusing its power to punish."[157]

The Court viewed civil forfeitures that punished an individual as limited by the Excessive Fines Clause.[158] In determining that the forfeiture was punishment, the Court relied heavily on *Halper's* statement that "'a civil sanction that cannot be fairly said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes is punishment.'"[159] Although the *Austin* case was decided under the Excessive Fines Clause by using a standard from a double jeopardy case, the Court indirectly endorsed the applicability of *Halper's* double jeopardy analysis to civil forfeitures.[160] In turn, because using double jeopardy results in a wholesale invalidation of a penalty rather than a simple reduction under the Excessive Fines Clause, the multipunishment protection became a much more attractive option for criminal defendants facing *in rem* civil forfeitures that could be characterized as punishment under the *Halper* standard.

E. The Court's Multipunishment Retreat: United States v. Ursery

On June 24, 1996, the Supreme Court handed down its latest multipunishment decision in *United States v. Ursery*.[161] In *Ursery*, the Supreme Court reversed the direction of its previous holdings in *Halper*, *Austin*, and *Kurth Ranch* and upheld the imposition of *in rem* civil forfeiture sanctions that were levied in conjunction with a criminal penalty.[162]

The Supreme Court reviewed *Ursery*, which originated in the Sixth Circuit, on a consolidated appeal with another case from the Ninth Circuit, *United States v. $405,089.23 in United States Currency*.[163] While both cases presented similar factual circumstances, they differed on the order in which the government imposed the criminal sanction and civil

156. *Austin*, 509 U.S. at 604-06.
157. *Id.* at 607 (citing Browning Ferris Industries, Inc. v. Kelco Disposal, 492 U.S. 257, 266-267 (1989)).
158. United States v. Austin, 509 U.S. 602, 610 (1993).
159. *Id.* at 610, 621 (quoting United States v. Halper, 490 U.S. 435, 448 (1989)).
160. *Austin*, 509 U.S. at 610-11, 621.
161. 116 S. Ct. 2135 (1996).
162. *Id.*
163. 116 S. Ct. 2135 (1996).

sanction.[164]

In *Ursery*, Michigan police discovered a large marijuana manufacturing operation in Guy Jerome Ursery's home.[165] Thereafter, the federal government instituted a civil forfeiture proceeding under 21 U.S.C. § 881(a)(7) to recoup Ursery's residence because it was used in the manufacturing operation.[166] Ursery settled the forfeiture suit by paying the federal government $13,250.[167] Ursery was subsequently indicted under 21 U.S.C. § 841(a)(1) for manufacturing marijuana.[168] After trial, a jury convicted Ursery of the charge and he was sentenced to 63 months in prison.[169]

Ursery appealed his criminal conviction, arguing that his criminal penalty constituted a second impermissible punishment in violation of the Double Jeopardy Clause as construed by *Halper*, *Austin,* and *Kurth Ranch*.[170] The Sixth Circuit Court of Appeals agreed with Ursery and reversed his criminal conviction, reasoning that the civil forfeiture constituted punishment and would, therefore, bar subsequent criminal penalties.[171]

In the other consolidated case, *United States v. $405,089.23*, two defendants, Charles Wesley Arlt and James Wren, were convicted of "conspiracy to aid and abet the manufacture of methamphetamine" in violation of 21 U.S.C. § 846, as well as conspiracy to launder monetary instruments in violation of 18 U.S.C. § 371.[172] The district court sentenced both defendants to life imprisonment and supervised release time.[173] The federal government also instituted a contemporaneous civil forfeiture proceeding under 18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. § 881(a)(6) against property owned by the defendants that was used in their illegal money laundering and drug operations.[174] After the conclusion of the criminal trial, the District Court granted the government's motion for summary judgment in the civil forfeiture proceed-

164. *See Ursery*, 116 S. Ct. at 2138.
165. *Id.* at 2138.
166. *Id.* at 2138-39. This was the same statute at issue in *Austin*. *See Austin*, 509 U.S. 606; *see generally* 21 U.S.C. § 881(a)(4)-(7) (1990).
167. United States v. Ursery, 116 S. Ct. 2135, 2139 (1996).
168. *Id.; see generally* 21 U.S.C. § 881(a)(1) (1994).
169. *Ursery,* 116 S. Ct. at 2137.
170. *Id.* (citing United States v. Ursery, 59 F.3d 568 (6th Cir. 1995)).
171. *Ursery*, 116 S. Ct. 2139.
172. *Id.; see generally* 21 U.S.C. § 846 (1994); 18 U.S.C. § 371 (1994).
173. *Ursery,* 116 S. Ct. at 2139.
174. *Id.; see generally* 18 U.S.C. § 981(a)(1)(A) (1994); 21 U.S.C. § 881(a)(6) (1994).

ing.[175]

Wren and Arlt appealed their civil forfeitures on Double Jeopardy grounds.[176] The Ninth Circuit held that the Double Jeopardy Clause barred the forfeiture in light of the defendants' earlier criminal convictions.[177] The appellate court reasoned under the *Halper* and *Austin* decisions that these forfeitures constituted punishment.[178]

In reviewing these consolidated cases, the Supreme Court first addressed whether the Double Jeopardy Clause has a multipunishment protection.[179] The Court concluded that the Double Jeopardy Clause prevented the imposition of successive prosecutions and successive punishments.[180]

After reaffirming the validity of the multipunishment protection, the Court examined whether it would be applicable to the forfeitures at issue in *Ursery*.[181] The Court ruled that a civil forfeitures imposed on the defendants did not constitute punishment for double jeopardy purposes, holding that *in rem* civil forfeitures at issue were remedial not punitive.[182]

In arriving at its conclusing, the Court borrowed the two part test from *89 Firearms* to determine whether a forfeiture constitutes "punishment."[183] Following *89 Firearms*, the Court first examined congressional intent to determine whether the forfeiture was meant to be a remedial civil sanction or a criminal penalty.[184] Second, the Court looked to see whether the forfeiture was so punitive in fact that it could not be fairly viewed as civil in nature despite congressional intentions that the forfeiture be applied as a remedial mechanism.[185]

In applying the two-part test to the forfeitures in *Ursery*, the Court found that Congress intended the statutes to be remedial in nature.[186]

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175. *Ursery*, 116 S. Ct. at 2139.

176. *Id.*

177. *Id.*

178. *Id.* (citing United States v. $405,089.23, 33 F.3d 1210 (9th Cir. 1994)).

179. United States v. Ursery, 116 S. Ct. 2135, 2139-2140 (1996). This may have been partly in response to the argument that Justice Scalia made in his *Kurth Ranch* dissent. *See Kurth Ranch*, 511 U.S. 767, 799-803 (1994) (Scalia, J., dissenting).

180. *Ursery*, 116 S. Ct. at 2139-40.

181. *Id.* at 2141.

182. *Id.* at 2142.

183. *Id.* at 2147 (citing United States v. One Assortment of 89 Firearms, 465 U.S. 354, 366 (1984)). *See also supra* notes 92-97, and accompanying text.

184. *Ursery*, 116 S. Ct. at 2147.

185. *Id.*

186. *Id.* at 2147-48.

The Court noted that the forfeiture statutes promoted awareness among property owners to prevent illicit activity from occurring on their property.[187] The Court also concluded that the forfeitures at issue in *Ursery* were not so punitive in form and effect to transform them into punitive criminal sanctions for double jeopardy purposes.[188]

Central to its analysis, the Court classified forfeitures in order to reconcile its past decisions in this area:

> *Halper* dealt with in personam civil penalties under the Double Jeopardy Clause; *Kurth Ranch* with a tax proceeding under the Double Jeopardy; and *Austin* with civil forfeitures under Excessive Fines Clause. None of those cases dealt with the subject of [*Ursery*]: in rem civil forfeitures for purposes of the Double Jeopardy Clause.[189]

It characterized *in rem* civil forfeitures as always having a remedial civil purpose that did not implicate the Double Jeopardy Clause.[190] The Court reasoned that because the *in rem* forfeiture is brought against the item while the criminal sanction is brought against the person, by virtue of a legal fiction, the individual can never be punished twice.[191] Consistent with this rationale, the Court reasoned that an *in personam* civil forfeiture, like the one used in *Halper*, was more susceptible to double jeopardy attack, albeit in rare circumstances, because it is brought against the offender along with a criminal penalty.[192] Because this scheme excluded *in rem* forfeitures from multipunishment regulation, the *Halper* test became an unnecessary determination and the Court abandoned its application to *in rem* sanctions.[193]

III. SCALIA'S INDICTMENT OF THE MULTIPUNISHMENT PROTECTION

Justice Antonin Scalia's viewpoint on the multipunishment protection provides some illuminating alternative reasoning on this doctrine.[194] In Scalia's *Kurth Ranch* dissent, as well as in his *Ursery* concurrence, he recommended that the Court abandon the multipunishment protection

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187. *Id.* at 2147.
188. *Id.* at 2148.
189. *Id.*
190. *Id.*
191. *Id.* at 2144.
192. *Id.* at 2146.
193. *Id.*
194. For a general discussion of Justice Scalia's viewpoint on this area, see Christopher E. Smith, *Justice Antonin Scalia and Criminal Justice Cases*, 81 KY. L. J. 187, 199-200 (1992-1993).

altogether for controlling exorbitant civil forfeitures.[195] In reaching his conclusion, he questioned the historical validity of the Double Jeopardy Clause's multipunishment prong and suggested that the Excessive Fines Clause may be a more appropriate tool.[196]

Justice Scalia recognized that *Kurth Ranch* and *Halper* created a watershed for the Supreme Court's double jeopardy jurisprudence.[197] While Scalia joined the majority decision in *Halper* which invalidated a civil penalty under the False Claims Act,[198] he did not follow the Court's rejection of the Montana drug tax provision in *Kurth Ranch.*[199] Scalia noted three reasons for abandoning greater use of the multi-punishment protection. First, Scalia recognized that the ambiguous standards for invalidating a civil sanction based on its punitive effect created an administrative nightmare for the courts.[200] Second, Scalia doubted the historical validity of double jeopardy's multipunishment prong.[201] Finally, Justice Scalia, along with Justice O'Connor in her separate dissent,[202] argued that the Excessive Fines Clause allows courts more flexibility in regulating excessive civil sanctions while also limiting the Double Jeopardy Clause to its traditional role of protecting individual defendants against a second prosecution for the same offense.[203]

Scalia's central argument stemmed from the inapplicability of the *Halper* analysis to the tax imposed in *Kurth Ranch.* Scalia understood that while the majority explicitly rejected the use of *Halper's* remedial analysis for the Montana drug tax, it employed much of *Halper's* rationale in arriving at the ultimate holding that the tax violated the Double Jeopardy Clause.[204] Scalia noted that *Halper's* analysis, which sought to find a purely remedial purpose for a civil penalty, was more easily applicable to a civil sanction than a tax provision because a tax

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195. *See* Dep't of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 799-803 (1994) (Scalia, J., dissenting); *see also* United States v. Ursery, 116 S. Ct. 2135, 2152 (Scalia, J., concurring).

196. *See Kurth Ranch,* 511 U.S. at 803, n.2 (Scalia, J., dissenting).

197. *Id.* at 798-799. (Scalia, J., dissenting).

198. *See* United States v. Halper, 490 U.S. 435, 447 (1989).

199. *See Kurth Ranch*, 511 U.S. at 802-04. (Scalia, J., dissenting).

200. *Id.* at 804.

201. *Id.* at 802-03.

202. *Id.* at 797-98.

203. *Id.* at 803-05.

204. *Id. See also infra* note 249, for some federal and state decisions that relied on *Halper's* analysis to overturn certain civil sanctions.

always has a non-remedial revenue-raising characteristic.[205]

Scalia found the *Kurth* majority's nullification of the tax under the multipunishment protection to be especially troublesome, since it carried "the implicit assumption that any proceeding which imposes "punishment" within the meaning of the multiple-punishment component of the Double Jeopardy Clause is a criminal prosecution."[206] Scalia reasoned that the majority's logic would have extreme consequences on governmental functions because, if a civil sanction was invalidated merely because it carries a punitive effect, then all sanctions, no matter what kind, have the potential to be invalidated by this standard.[207] Furthermore, since the key multipunishment examination under the *Halper* and *Kurth Ranch* precedent was whether an individual was effectively being punished twice for the same offense, then "the order of punishment [could not] possibly make any difference."[208] Double jeopardy would always invalidate one of the punitive sanctions: "In the [*Kurth Ranch* decision], as in *Halper* itself, we confront the relatively easy task of disallowing a civil sanction because criminal punishment has already been imposed. But many cases . . . will demand much more of us: disallowing criminal punishment because a civil sanction has already been imposed."[209]

Because Scalia viewed *Kurth Ranch* as dramatically expanding upon the original *Halper* multipunishment reasoning,[210] he felt obliged to explore the constitutional validity of the multipunishment prong altogether: "The difficulty of applying *Halper's* analysis to Montana's Dangerous Drug Tax has prompted me to focus on the antecedent question whether there *is* a multiple punishments component of the

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205. *Id.* at 787-89 (Rehnquist, C.J., dissenting).

206. *Id.* at 805 (Scalia, J., dissenting).

207. *Id.* at 804. Before *Ursery*, certain lower court decisions adopted the rationale that Scalia argued against in his dissent. *See supra* note 249.

208. *Id.* at 804. This sentiment was probably why the *Ursery* court consolidated two cases in which the civil sanctions were imposed either before or after criminal punishment. *See* United States v. Ursery, 116 S. Ct. 2135, 2139 (1996).

209. *See* Dep't of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 804 (1994). Before *Ursery*, invalidation of subsequent criminal sanctions was a key concern. For example, many criminal courts witnessed drunk driving prosecutions in which defendants claimed that their driver's license suspension immediately following their arrest constituted punishment. They argued that because the license suspension constituted an initial punishment under double jeopardy, any further criminal punishment for driving while intoxicated would be unconstitutional under the multipunishment protection. *See, e.g.*, State v. Uncapher, 650 N.E.2d 195 (Ohio Mun. 1995) (rejecting this double jeopardy defense).

210. *Kurth Ranch*, 511 U.S. at 804 (Scalia, J., dissenting).

Double Jeopardy Clause."[211] Scalia found that the true purpose underlying the multipunishment protection, originating in *Ex Parte Lange*[212] and carried through to *North Carolina v. Pearce*,[213] was to prohibit judicial overreaching in the sentencing of a criminal defendant.[214] Scalia believed that double jeopardy should be used to confine the sentencing judge's discretion to the bounds constructed by the legislature to avoid imposing multiple punishments for the same offense.[215] Based on those decisions, Scalia determined that the multipunishment protection was really more of a due process protection "derived from the due process requirement of legislative authorization" than an implied double jeopardy protection.[216]

Along with his more limited view of the multipunishment protection's scope, Justice Scalia recognized the Excessive Fines Clause as a better solution to the problem of unusually high civil sanctions imposed along with a criminal penalty.[217] The Excessive Fines Clause of the Eighth Amendment was revitalized "from obscurity" in *Austin*.[218] Scalia noted that the *Austin* decision used similar punishment analysis as *Halper* and achieved similar results, but avoided the *Halper* decision's unnecessary expansion of double jeopardy's multipunishment protection.[219]

IV. CHANGING STANDARDS FOR EVALUATING PUNISHMENT

Before *Ursery*, the *Halper*, *Austin*, and *Kurth Ranch* decisions created the impression that the Supreme Court had constructed a new "effects" standard for evaluating non-criminal sanctions. By expanding the multipunishment protection beyond its traditional role of controlling the sentencing and prosecution of criminal defendants, these cases had adopted a standard that made time-tested law enforcement procedures vulnerable to constitutional attack and created a new escape mechanism

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211. *Id.* at 802-03.
212. 85 U.S. (18 Wall) 163 (1873).
213. 395 U.S. 711 (1969).
214. *See Kurth Ranch*, 511 U.S. at 804 (Scalia, J., dissenting).
215. *Id.* at 800-01.
216. *Id.* at 800.
217. *Id.* at 803 n. 2.
218. *See* Dep't of Revenue of Montana v. Kurth Ranch, 511 U.S. 769, 803 n.2 (1994) (Scalia, J., dissenting) (citing United States v. Austin, 509 U.S. 602 (1993)); *see also* Alexander v. United States, 509 U.S. 544 (1993) (holding that the Excessive Fines Clause could invalidate a civil forfeiture when the government was attempting to seize defendant's business and cash involved in racketeering operation).
219. *See* Kurth Ranch, 511 U.S. at 803.

for criminal defendants.

A. *The Legislative Intent Test Before the Halper-Austin-Kurth Precedent*

From the initial multipunishment analysis of *Helvering v. Mitchell*,[220] the Supreme Court has looked for indications of what the legislature intended when it authorized a sanction, to determine whether it was designed to punish.[221] For a civil sanction to constitute punishment, the legislature must create the penalty and the courts must implement the sanction for the purpose of punishing.[222] Proving that a sanction is punitive under multipunishment analysis is difficult as courts will presumptively look to a non-remedial regulatory purpose for the sanction and show deference to the legislature.[223]

Courts use a variety of indicators to decide whether the legislature intended a civil sanction to punish. In deciphering the legislature's intent, legislative history, statutory language, and procedural structures provide the most important indications for determining the nature of the sanction.[224] In particular, legislation that contains separate criminal and civil sanctions accompanied by separate procedures suggests the legislature enacted the separate civil sanction to be a non-punitive remedial measure.[225]

In *Kennedy v. Mendoza-Martinez*[226] and subsequently in *United States v. Ward*,[227] the United States Supreme Court established a related framework for judging the punitive intent of legislation in order to provide a defendant with the proper procedural protections. In both cases, the defendants faced civil penalties.[228] However, they claimed that regardless of the penalty's civil label, they were entitled to the procedural protections that the Constitution afforded criminal defendants.[229] The Court found that a proceeding designed to punish could

220. 303 U.S. 391 (1938).
221. *Id.* at 399.
222. *Id.*
223. *See* Fleming v. Nestor, 363 U.S. 603, 617-621 (1960).
224. *See Mitchell*, 303 U.S. at 399.
225. *See* United States v. One Assortment of 89 Firearms, 465 U.S. 354, 363 (1984); *Mitchell*, 303 U.S. at 399.
226. 372 U.S. 144 (1963).
227. 448 U.S. 242 (1980).
228. *Id.* at 245, 247-49.
229. *See Kennedy*, 372 U.S. at 159-161; *Ward*, 448 U.S. at 247.

trigger various procedural due process rights.[230] In essence, the *Kennedy-Ward* test exemplified strict legislative construction and its overlapping analysis could have provided a useful tool for evaluating multipunishment questions.[231] The *Halper* court, while acknowledging that the *Kennedy-Ward* test may have been useful in determining whether a civil forfeiture constituted punishment under double jeopardy, declined to adopt its analytical framework.[232]

Under *Kennedy-Ward*, the individual defendant faces a huge burden in proving that a civil forfeiture provision constitutes a criminal proceeding, thus necessitating the use of certain procedural due process elements.[233] The *Kennedy-Ward* intent test offers a seven-factor method of determining the punitive nature of a sanction and provides a narrow focus for judicial subjectivity.[234] The deferential language of the test acknowledges the legislature's power to simultaneously punish and regulate.[235] Consequently, legislatures have much leeway in crafting both punitive and remedial mechanisms.[236]

Statutory construction has always had its significant disadvantages. First, legislative intent is rarely recorded, especially on a state level, so the reasons for a statutory enactment can be impossible to discover.[237] When legislative history for a statute can be found, it usually demonstrates conflicting legislative motivations among various legislators.[238]

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230. *See Kennedy*, 372 U.S. at 168-169. The Court highlighted seven factors for determining if a civil proceeding requires procedural due process safeguards afforded criminal defendants:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution or deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry [into whether a proceeding is penal or remedial], and may often point in differing directions.

Id.

231. *See* Dep't of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 806 (1994) (Scalia, J., dissenting).

232. *See* United States v. Halper, 490 U.S. 435, 447 (1989).

233. *See Kurth Ranch*, 511 U.S. at 806-09 (Scalia, J., dissenting).

234. *Id.*; *see also supra* note 230 and accompanying text.

235. *See Kennedy*, 372 U.S. at 168-69; *see also supra* note 230.

236. *See Kennedy*, 372 U.S. at 168-69; *see also* Fleming v. Nestor, 363 U.S. 603, 617-621 (1960) (holding that a statute will always carry the presumption of constitutionality).

237. *See* J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 443 (1976).

238. *See* United States v. O'Brien, 391 U.S. 367, 384 (1968).

Furthermore, analysis of statutory language and structure often provides ambiguous messages.[239] Legislative intent also does not necessarily solve the unusual problem of a normally remedial sanction inadvertently having a punitive effect on a particular defendant.[240] The *Halper* court seemed to recognize these shortcomings, and also realized that an intent test would not provide the defendant Halper any relief in his unique situation.[241] Consequently, the Court used an "effects" test for determining whether to invoke multipunishment protection.[242]

B. The Effects Test Under the Halper-Austin-Kurth Precedent

Both *United States v. Austin* and *Department of Revenue of Montana v. Kurth Ranch*, with their muddied view of punishment, essentially completed a journey that *Halper* had begun, moving away from strictly evaluating the legislative purpose underlying a civil sanction to examining its punitive effects.[243] By using much of *Halper's* language which dismissed statutory construction in favor of examining the "personal" impact of a punitive sanction, the *Kurth Ranch* and *Austin* decisions seemingly punctuated the Court's increased acceptance of a broader multipunishment doctrine.[244] The effects standard for punishment focused on the stigma and burden placed on the sanctioned individual as the determinative factor of a punitive state measure.[245] In *Kurth Ranch*, the majority used this standard at various points in its opinion: "[A]t some point, an exaction labeled as a tax approaches punishment, and our task is to determine whether Montana's drug tax crosses that line."[246]

Because the Court invalidated a variety of different sanctions, *Halper*, *Austin*, and *Kurth Ranch* produced a momentum that suggested that other governmental sanctions—imposed administratively or

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239. *See* Breed v. Jones, 421 U.S. 519, 530-31 (1975).

240. *See, e.g.*, United States v. Halper, 490 U.S. 435 (1989).

241. *Id.* at 447.

242. *Id.*

243. *See* Dep't of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 802-803 (1994) (Scalia, J., dissenting).

244. *See Kurth Ranch*, 511 U.S. at 779-80; *Halper*, 490 U.S. at 447.

245. *See Kurth Ranch*, 511 U.S. at 778-80. The majority reasoned that the tax was punitive, citing to explicit legislative intent language that highlighted the "burden" the tax would place on drug law violators. *Id.* at 780 n.18. While the Court seems to have been using typical statutory construction by looking at legislative intent, emphasizing the "burden" on the violator is an effects standard. *Id.* Rehnquist criticized the Court's mixed bag of standards as an unclear "hodgepodge of criteria". *Id.* at 785. (Rehnquist, C.J., dissenting).

246. *Id.* at 780.

civilly—could be barred by the multipunishment protection. Under the *Halper* test, almost any sanction could have potentially constituted punishment, because most sanctions have some punishing consequences that directly affect an individual defendant. This subjectivity exposes the difficulty in classifying a sanction that has both punitive and remedial qualities—no bright line determinations exist for deciding whether a sanction simply carries a "sting of punishment" or whether it constitutes a true criminal penalty.[247]

The *Hess* and *Mitchell* courts minimized this inherent subjectivity by adhering to the more definitive legislative intent standard.[248] While not an optimal barometer for determining what sanctions punish, legislative structure, language, and intent provide at least some objective measures to differentiate penal from remedial sanctions. To a large extent this method was abandoned by *Halper.*

V. THE IMPACT OF THE URSERY DECISION

A. The Ursery Multipunishment Standard

The *Halper* standard for evaluating civil sanctions represented a departure from the traditional statutory construction used by the Court. The subsequent *Kurth Ranch* and *Austin* decisions signified a continuation of the *Halper* rationale and suggested that if a tax or an *in rem* civil forfeiture could be considered punitive, then almost any civil sanction could be similarly characterized. These decisions gave the double jeopardy multipunishment prong new life, and, consequently, other state sanctions imposed in conjunction with a criminal penalty became vulnerable to double jeopardy attack.[249]

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247. *See* United States *ex. rel.* Marcus v. Hess, 317 U.S. 537, 551-52 (1942).

248. *Id; see also* Mitchell v. Helvering, 303 U.S. 391 (1938).

249. The cases that the *Ursery* court reviewed on consolidated appeal provide examples of how *Halper-Austin-Kurth* doctrine triggered increased application of the multipunishment protection among some of the federal circuits. *See* United States v. Ursery, 59 F.3d 568, 575 (6th Cir. 1995); United States v. $405,089.23 in United States Currency, 56 F.3d 41, 42 (9th Cir. 1995). *See also* United States v 9844 S. Titan Court, Unit 9, Littleton, Co., 75 F.3d 1470, 1491 (10th Cir. 1996) (holding that the multipunishment protection invalidated the forfeiture of home, other items used in drug offense due to previous criminal penalty).

Before *Ursery* many state courts also adopted the *Halper-Austin-Kurth* treatment of the multipunishment protection. *See, e.g.,* Wilson v. Dep't of Revenue, 662 N.E. 2d 415, 420 (Ill. 1996) (holding that drug tax violated double jeopardy's multipunishment protection); Clifft v. Indiana Dep't of State Revenue, 641 N.E.2d 682, 685 (Ind. Tax 1994) (also holding that drug tax violated double jeopardy's multipunishment protection); City of New Hope v. 1986 Mazda 626, 546 N.W. 2d 300, 303 (Minn. App. 1996) (holding that forfeiture of car violated the multipunishment protection due to previous criminal conviction for driving-while-intoxicated);

The *Ursery* court sought to contain the *Halper-Austin-Kurth* doctrine by categorizing various civil forfeitures that could be invalidated under the multipunishment protection.[250] The Court distinguished its prior multipunishment precedent, noting that *Halper* dealt with an *in personam* penalty, *Kurth Ranch* concerned a tax, and the *Austin* decision was decided under the Excessive Fines Clause.[251] The Court concluded that the multipunishment protection has historically never applied to *in rem* civil forfeitures like the sanctions at issue in *Ursery*.[252] Thus, under the rationale used in *Ursery*, while *in personam* civil penalties could implicate the double jeopardy multipunishment protection, *in rem* civil forfeitures never trigger double jeopardy attack because they are never brought against a person, but against the instrumentalities used to commit a crime.[253] Consequently, an individual defendant, facing both a civil forfeiture and a criminal penalty, could never sustain two punishments for one offense.

The Court also reasoned that because *in rem* forfeitures serve largely remedial purposes of making illegal behavior unprofitable or impossible, they will never implicate the double jeopardy multipunishment protection.[254] In reaching this conclusion, the Court was assuming a case in which a forfeited instrumentality was related to the commission of a crime, whereby its forfeiture acts as a remedial measure that will prevent the instrumentality from being used in the same fashion again.[255]

Because the *Ursery* decision hinges on a stark system of categorization in its application of the multipunishment protection, the majority rests on a premise that has some logical inconsistencies. The decision's most blatant problem is evident in how it distinguishes between *in personam* civil penalties and *in rem* civil forfeitures.[256] Under *Ursery*,

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Desimone v. State, 904 P.2d 1, 4 (Nev. 1995) (holding that assessment of drug taxes and civil penalties precluded subsequent criminal conviction under the multipunishment protection); State v. Davis, 903 P.2d 940, 944 (Utah 1995) (holding that forfeiture of vehicle precluded subsequent criminal prosecution for drug possession under the multipunishment protection).

250. United States v. Ursery, 116 S. Ct. 2135, 2142 (1996).

251. *Id.*

252. *Ursery*, 116 S. Ct. at 2142.

253. *Id.*

254. *Id.*

255. *Ursery* also considered forfeiture of contraband and proceeds, although as Justice Stevens clearly points out, forfeiture of those items can never implicate the multipunishment protection, because the criminal defendant never had a valid legal interest in them. *See Ursery*, 116 S. Ct. at 3215 (Stevens, J., concurring in part and dissenting in part).

256. *See* Rachel L. Brand, *Civil Forfeiture as Jeopardy:* United States v. Ursery, 116 S. Ct. 2135 (1996), 20 HARV. J. L. & PUB. POL'Y 292, 304-06 (1996).

while an *in personam* penalty, like the fine in *Halper*, can be sufficiently punitive to trigger the multipunishment protection, the *in rem* forfeiture of a home or other similar instrumentality, which could amount to a greater monetary loss than an *in personam* penalty, could never bring about double jeopardy protection.[257]

The Court explains this inconsistency by emphasizing that double jeopardy's multipunishment protection has historically never applied to *in rem* forfeitures because those actions are technically brought against items, not individuals, whereas multipunishment protection can apply to *in personam* forfeitures because they are brought against individuals.[258] This reliance on the historical application of the multipunishment protection was made easy by the numerous past cases concerning *in rem* forfeitures.[259] However, the Court would have a more difficult time similarly analyzing other non-traditional civil sanctions, such as administrative suspensions, that have gained prevalance in contemporary law enforcement, yet have not faced extensive multipunishment scrutiny.

As another shortfall, the *Ursery* court engaged in only limited statutory construction in its evaluation of *in rem* forfeitures. It should have more heavily relied on traditional statutory construction analysis and avoided the inflexible application of the multipunishment protection according to rigid *in rem* or *in personam* categories. Using statutory construction would have revealed that the forfeitures at issue in *Ursery* were not designed by the legislature to punish a criminal defendant. Instead, the forfeitures were directed against the owner of the forfeited property in order to prevent its use in criminal activities. If the owner and criminal defendant happen to be the same individual, such an occurrence would be purely coincidental. In essence, an *in rem* forfeiture is designed by the legislature to prevent criminal activity, which is a remedial purpose. The Court could have easily explained that the *in rem* forfeiture at issue in *Ursery* was designed to yield the remedial benefit of stopping future criminal activity.[260]

Ursery also leaves unanswered *Halper's* call to assess a civil sanction's personal impact on an individual defendant in determining whether the sanction punishes.[261] Unquestionably, an *in rem* civil forfeiture can have as much of a personal impact on a defendant as would a punitive

257. *Id.*
258. *Ursery*, 116 S. Ct. at 2142.
259. *See supra* notes 83-97 and accompanying text.
260. *Ursery*, 116 S. Ct. at 2145.
261. *Halper*, 490 U.S. at 447.

in personam sanction. In this regard, possibly the Court's greatest error in *Ursery* was its failure to overrule the awkward language of *Halper* and simply examine whether a sanction has a reasonably significant remedial impact that could legitimately be considered non-punitive.

Another problem with the *Ursery* decision is that its reasoning creates a huge umbrella that allows all *in rem* civil forfeitures to withstand multipunishment attack. In fact, under certain circumstances many of those forfeitures could be fairly construed as punitive measures. To that end, Justice Stevens' partial concurrence argues that the Court should have distinguished between certain types of *in rem* forfeitures so that forfeitures of contraband and proceeds of illegal activity will never trigger the double jeopardy protection whereas forfeiture of instrumentalities could produce second jeopardy if deemed sufficiently punitive.[262]

B. Alternatives to Ursery

Aside from its tenuous rationale, *Ursery* is a boon for law enforcement. Before *Ursery*, law enforcement faced increasing pressure to counter criminal defendants' ever-increasing multipunishment arguments.[263] In solving this problem, law enforcement could have opted for two solutions. One way to avoid the multipunishment defense would have been to impose all civil sanctions and criminal sanctions in one unified proceeding, since this has historically not implicated double jeopardy's multipunishment protection.[264] However, this would have challenged both state and federal governments to structurally reorganize their civil and criminal prosecution procedures and personnel, which might have been an impossible task given the complex nature of federal and state enforcement arms.[265] Furthermore, due to the differing burdens of proof, imposing civil and criminal sanctions in one proceeding may have also been a procedurally difficult option.[266]

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262. *See Ursery*, 116 S. Ct. at 2152-2163 (Stevens, J., concurring in part and dissenting in part).

263. See *supra* note 249 for examples of successful multipunishment arguments made by defendants prior to *Ursery*.

264. *See* Dep't of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 778-79 (1994); *Halper*, 490 U.S. at 450. The government made this argument in *Ursery*, but the Court decided the case on other grounds. *See Ursery*, 116 S. Ct. at 2140 n.1.

265. *See generally* Glickman, *supra* note 119, at 1271 n.117 (suggesting that the federal government would be challenged to overhaul its civil and criminal prosecutions in light of *Halper*).

266. *Id.* at 1280-81.

Similar to imposing all sanctions in a single unified proceeding, law enforcement could also have argued that the doctrine of continuing jeopardy prevents the multipunishment protection from invalidating punitive civil sanctions. The concept of continuing jeopardy runs contrary to the *Halper-Kurth* rationale, but not against most other double jeopardy case law.[267] Continuing jeopardy was previously advanced in Justice Frankfurter's concurring opinion in *United States* ex. rel. *Marcus v. Hess* where he noted that the framers never envisioned the Double Jeopardy Clause to preclude the government from imposing both civil and criminal sanctions for one offense.[268] Under continuing jeopardy, both civil and criminal sanctions would be considered part of one single proceeding even if imposed at different times.[269] Both sanctions could be punitive, since they would be considered part of an overall comprehensive scheme created by the legislature to sanction illegal conduct.[270]

C. *The Impact of Ursery*

The *Ursery* majority, authored by Chief Justice Rehnquist, emphasized through past precedent that a more limited multipunishment protection exists within the Double Jeopardy Clause. The majority specifically noted that many cases indicate that the multipunishment protection was designed simply to protect judicial overreaching during sentencing,[271] but nowhere—except in *Halper* and *Kurth Ranch*—had the Court used double jeopardy to invalidate separate civil sanctions.[272]

While *Ursery* limited double jeopardy's power to regulate civil forfeitures to all but a few cases, criminal defendants are not without recourse in the event that the government seeks a penalty that is vastly disproportionate to the remedial cost of the defendant's offense. Increased application of the Excessive Fines Clause may be the necessary tool to achieve a balance between regulating excessive forfeitures and

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267. *See Kurth Ranch*, 511 U.S. at 800-02. (Scalia, J., dissenting).

268. *See* United States *ex. rel.* Marcus v. Hess, 317 U.S. 537, 553 (1942) (Frankfurter, J., concurring).

269. *Id.*

270. *Id.* at 555.

271. *See* North Carolina v. Pearce, 395 U.S. 711, 717-18 (1969); *see also* United States v. DiFrancesco, 449 U.S. 117, 139 (citing Ex Parte Lange, 85 U.S. (18 Wall.) 163 (1873)) (suggesting that *Ex Parte Lange* would never have needed to be decided if Congress would have allowed both fine and imprisonment in sentencing of defendant).

272. *See Kurth Ranch*, 511 U.S. at 802-05. (Scalia, J., dissenting).

allowing the government remedial benefits of civil sanctions.[273]

Using the Excessive Fines Clause to regulate civil sanctions yields benefits for both the criminal defendant and government interests. First, with the Excessive Fines Clause, the defendant has the benefit of having a reviewing court reduce any forfeitures to a non-excessive level, thereby protecting the criminal defendant from incurring a second punishment.[274] Second, because the Double Jeopardy Clause is not implicated, prosecutors can utilize both criminal and civil sanctions against the defendant, without invalidating one at the expense of the other.[275] Furthermore, using the Excessive Fines Clause will theoretically preserve the true remedial benefits of the civil sanction imposed on the defendant.[276]

VI. CONCLUSION

The United States Supreme Court's clarification of the double jeopardy multipunishment protection in *United States v. Ursery* bodes well for government agencies and law enforcement who have become accustomed to forfeitures as both a significant revenue source and as remedial tool to assist in their regular enforcement operations. A limited multipunishment protection will likely promote greater use of *in rem* civil forfeitures.

Nevertheless, *Ursery* has some deficiencies. *Ursery* fails to directly answer *Halper's* call to assess the subjective impact of a civil sanction on an individual defendant. More importantly, under *Ursery*, an excessive *in rem* civil forfeiture which has an identical monetary value to an *in personam* civil penalty like the one in *Halper* would be valid and enforceable in the face of double jeopardy attack.

Criminal defendants facing punitive civil sanctions are not without recourse. Now that the Supreme Court has restricted the multipunishment protection in the civil forfeiture arena, defendants can still utilize the Excessive Fines Clause to avoid a punitive civil forfeitures.

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273. *See* Elizabeth S. Jahncke, Note, *United States v. Halper, Punitive Civil Fines, and the Double Jeopardy and Excessive Fines Clauses*, 66 N.Y.U. L. REV. 112, 139-140 (1991).

274. *See* United States v. Austin, 509 U.S. 602, 627 (1993). "In the case of a monetary fine, the Eighth Amendment's origins in the English Bill of Rights, intended to limit the abusive penalties assessed against the king's opponents, demonstrate that the touchstone is value of the fine in relation to the offense." *Id.* at 627 (citing Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257, 266-67 (1989)).

275. *See* United States *ex. rel.* Marcus v. Hess, 317 U.S. 537, 553 (1942) (Frankfurter, J., concurring).

276. *Id.*

Furthermore, the multipunishment protection still safeguards defendants facing punitive *in personam* civil penalties as well as various other civil sanctions.

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